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In the Supreme Court of the United States

OCTOBER TERM, 1975

DUNCAN SCOTT MACKENZIE AND
RICHARD STEVEN BONDAR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that evidence was unlawfully seized from their vehicles, that a statement made by petitioner Bondar to officers before receiving *Miranda* warnings should have been excluded from evidence, and that the application of the Controlled Substances Act to marijuana is unconstitutional.

After a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of possessing and conspiring to possess 629 pounds of marijuana, in violation of 21 U.S.C. 841 (a)(1) and 846. Petitioner MacKenzie was sentenced to two years' imprisonment and petitioner Bondar was sentenced to the custody of the Attorney General under the Federal Youth Corrections Act (18 U.S.C. 5010). The court of appeals affirmed in an unpublished opinion (Pet. App.).

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. 30-32), showed that on January 25, 1974, a federal agent observed an unoccupied Chevrolet automobile parked near the Mexican border in Calexico, California, in an area frequently used by smugglers for narcotics "drops." The agent noticed that the car was fitted with heavy-duty air-suspension shock absorbers of the type commonly installed on cars used to smuggle marijuana and that despite the special shock absorbers, the vehicle was sitting low in the back and its rear tires, although new, were bulging. A dog trained to detect the scent of marijuana was brought to the scene and indicated by his reaction that the drug was present in the trunk of the car.

Federal agents undertook a surveillance of the unoccupied Chevrolet. After several hours petitioner MacKenzie got into the car and drove away on an interstate highway. The agents followed and observed that the Chevrolet was traveling in tandem with a van, a common *modus operandi* of drug smugglers. The Chevrolet and the van traveled together for some 35 miles, usually only 100 yards apart and never separated by more than a quarter of a mile. After the van had flashed its headlights several times when no traffic was approaching, as if to signal the Chevrolet, the agents stopped both vehicles.[1] Petitioner Bondar, the driver of the van, in response to the agents' inquiry, denied knowing MacKenzie. The agents searched the Chevrolet's trunk and seized 629 pounds of marijuana. The van, which was subsequently searched at DEA headquarters in Calexico, contained letters addressed to MacKenzie.

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[1]In addition to the agents following the vehicles in an automobile, another agent maintained surveillance from a small plane flying over the highway (Tr. 99). The flashing lights by the van were observed by the agent maintaining air surveillance and that fact was communicated to agents on the ground (Tr. 199).

1. Contrary to petitioners' contention, the agents were justified in searching both vehicles without obtaining search warrants. An agent observed the low sitting car with special shock absorbers parked in a notorious drug trafficking location, a trained dog signalled that there was marijuana in the trunk, and this car was then driven in tandem with a van, a common *modus operandi* of drug smugglers. These facts established probable cause for the search of the vehicle. *Carroll* v. *United States*, 267 U.S. 132.

Contrary to petitioners' contention (Pet. 17-19), a warrant was not required merely because the agents deferred a search of the car until after petitioner MacKenzie appeared and drove it away. Although petitioner MacKenzie did not appear for several hours, and in retrospect it might have been possible to secure a warrant before his arrival, it was equally likely at the time that MacKenzie would appear and drive the car away soon after the agent initially observed it. Probable cause must be determined on the facts confronting the agents at the time; hindsight is an improper criterion for evaluating the need for a warrant. See, *United States* v. *Church*, 490 F.2d 353, 354-355 (C.A. 9), certiorari denied, 416 U.S. 983. In any event, the agents were not required to secure a warrant as soon as they had obtained probable cause. See *Hoffa* v. *United States*, 385 U.S. 293, 310.

When the agents saw the van driven by petitioner Bondar proceeding in tandem with the car believed to contain a large quantity of marijuana and learned that it appeared to be signalling the other vehicle with its headlights, they had probable cause to stop and search it without a warrant in view of the possibility of flight on the open highway and the likely presence of contraband. *Carroll* v. *United States, supra*. The

court of appeals correctly held, since the officers could lawfully have searched the van without a warrant when they stopped it, they were entitled to postpone the search until the vehicle was removed to a more convenient location. *Chambers* v. *Maroney*, 399 U.S. 42. See also, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 463.

2. At trial, Agent Walker testified, over petitioner Bondar's objection, that after both vehicles were stopped, he approached petitioner Bondar, identified himself as a government agent conducting a narcotics investigation, and asked him "who his friend was in the vehicle just to the east" (Tr. 152-153). Bondar replied that he "didn't have any friend or denied any knowledge of knowing anyone in the vehicle" (*id.* at 153). Petitioner Bondar contends that the agent's testimony should have been excluded because he had not been given *Miranda* warnings prior to the inquiry.

Miranda warnings are designed to prevent the coercion that may result from a police-dominated inquisitorial atmosphere, and they are required when the person being interrogated is "in custody at the station or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 477. But this Court's *Miranda* decision was not intended to preclude law enforcement officers from conducting a preliminary on-the-scene investigation to determine whether a crime had been committed or was in progress. See 384 U.S. at 477-478. The agent's inquiry to petitioner Bondar concerning his acquaintance with the driver of the vehicle that Bondar had been following was made without any indication to petitioner that he was under arrest and, in the circumstances, was a reasonable preliminary question. See *Love* v. *United States*, 407 F.2d 1391 (C.A. 9); *United States* v. *Hall*, 421 F.2d 540 (C.A. 2), certiorari denied, 397 U.S. 990.[2]

3. Finally, petitioners claim (Pet. 24-28) that their convictions for possession of 629 pounds of marijuana were unconstitutional because the Controlled Substances Act does not require, and the government failed to prove, that they knew that possession of marijuana was unlawful. They argue that since the offenses punished by the Controlled Substances Act are *malum prohibitum* rather than *malum in se*, ignorance of the law is a defense. But, as the court below correctly concluded (Pet. App. 32), due process does not require proof that petitioners knew that possession of marijuana is illegal. See *United States* v. *Balint*, 258 U.S. 250; see also *United States* v. *International Minerals Corp.*, 402 U.S. 558.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]Petitioner Bondar's suggestion (Pet. 22-24) that *Miranda* warnings were required because there was probable cause to stop and search his vehicle, and, thus, suspicion had focused on him, is insubstantial. This contention is founded on the erroneous premise that the existence of probable cause necessarily results in any police questioning being custodial interrogation. But probable cause to stop and search a vehicle does not automatically create a potentially coercive atmosphere requiring *Miranda* warnings. See *United States* v. *Hall*, *supra*, 421 F.2d at 543. Rather it is the nature of the question asked and the circumstances surrounding the inquiry that are determinative. And, as shown in the text, neither the content nor the context of the agent's question to petitioner Bondar required the giving of *Miranda* warnings.